

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 74297-s76M BY ROBERT E. AND	)	
SHIRLEY ANDERSON AND APPLICATION	)	
FOR CHANGE OF APPROPRIATION WATER	)	
RIGHT NO. G(W)012684-s76M BY	)	
ROBERT E. ANDERSON	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 3, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74297-s76M is hereby granted to Robert E. and Shirley Anderson to appropriate 50 gallons per minute up to 80.60 acre-feet of water per year from Plourde Creek for a flow through recreational fish pond and up to .05 acre-foot per year for stock water at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West, Mineral County by means of a collection box and pipeline. The place of use for the fish pond is the

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NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10 and the place of use for the stock water is the E $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10. The period of appropriation and period of use for both uses is from January 1 through December 31, inclusive of each year.

1. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This Permit is subject to the condition that the Permittee shall install an adequate device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand to the Department of Natural Resources and Conservation, Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806-5004.

Subject to the following terms, conditions, restriction, and limitations specified below, Application to Change Appropriation Water Right No. G(W)012684-s76M is hereby granted to Robert E. Anderson to change the point of diversion to the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West.

1. This Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to

authorize the appropriator to divert water to the detriment of any senior appropriator.

2. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

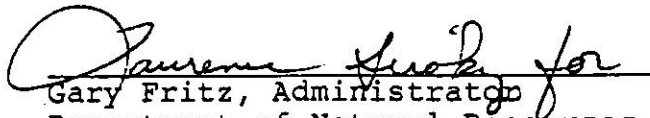
3. This Authorization is subject to the condition that the Appropriator shall install an adequate device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand to the Department of Natural Resources and Conservation, Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806-5004.

4. This Authorization is subject to the condition that the control gate in the dam shall remain open at all times after the installation of the new diversion works.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 3 day of June, 1991.

  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 3<sup>rd</sup> day of June, 1991 as follows:

Robert and Shirley Anderson  
304 Mullan Gulch Road  
St. Regis, MT 59866

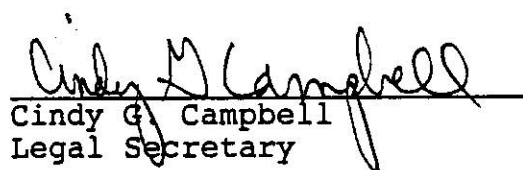
Michael and Barbara Guthneck  
338 Mullan Gulch Road  
St. Regis, MT 59866

Charles and Mary Jensen  
40 Frontage Road West  
St. Regis, MT 59866

Robert H. Scott  
Attorney at Law  
P.O. Box 7826  
Missoula, MT 59807

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806

Vivian A. Lighthizer  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

FILMED  
MAY 14 1991

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
NO. 74297-S76M BY ROBERT E. AND	)	
SHIRLEY ANDERSON AND APPLICATION	)	PROPOSAL FOR DECISION
FOR CHANGE OF APPROPRIATION WATER	)	
RIGHT NO. G(W)012684-S76M BY	)	
ROBERT E. ANDERSON	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provision of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 4, 1991, in Superior, Montana.

Applicants Robert E. and Shirley Anderson appeared in person and by and through counsel Robert Scott.

Lee Yelin, Water Right Specialist with Land and Water Consulting Inc., appeared at the hearing as a witness for the Applicants.

Edwin Sansom, former resident of the Applicants' property, appeared at the hearing as a witness for the Applicants.

Objectors Michael and Barbara Guthneck appeared at the hearing pro se.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

Objectors Charles and Mary Jensen did not appear at the hearing, therefore, their objections are hereby dismissed.

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### EXHIBITS

Applicants' Exhibit 1 is an enlargement of a portion of a USGS Quadrangle map enhanced to show the Applicants' existing diversion means, pipelines, the Applicants' proposed point of diversion, and the Objectors' point of diversion and pipeline. This exhibit was received into the record without objection.

Applicants' Exhibit 2 is a letter from the Mineral County Board of Commissioners to Les Pederson. The Guthnecks objected to this exhibit on the grounds it was irrelevant. Applicants were laying foundation to establish Shirley Anderson's expertise in fish pond management. Objection overruled.

Applicants' Exhibit 3 consists of three photographs mounted on an 8½" by 11" sheet of paper. The year each picture was taken is written beside each photograph with other comments beside the top and the bottom photographs. This exhibit was received into the record without objections.

Applicants' Exhibit 4 "A" through "I" consists of ten pages, the first page is simply a cover page, the remaining nine pages are copies of photographs taken by Lee Yelin in March of 1991. Photograph "A" is of Applicants' existing reservoir. Photograph "B" shows Applicants' pipeline shut-off valve located next to the first riser on pipeline. Photograph "C" is of the existing side slopes of Applicants' ponds to be modified. Photograph "D" shows Objectors' diversion on Plourde Creek and the excess water flowing out of it. Photograph "E" is of Plourde Creek entering Applicants' existing reservoir. Photograph "F" shows Applicants'

existing reservoir outlet structure. Photograph "G" is a close-up of Applicants' existing outlet. Photograph "H" is of Applicants' shut-off valve/plug for buried Plourde Creek gravity pipeline as it enters Applicants' field. Photograph "I" shows an existing diversion structure which is identical to the proposed diversion structure.

Objectors requested the caption of photograph "D" be amended by adding that the water flow was estimated rather than measured. Objectors requested and Applicants stipulated to amending the caption of photograph "E" to "Reservoir is not located far enough upstream to provided adequate head for gravity flow irrigation according to information provided to Mr. Yelin by Applicant." Objectors requested and Applicants stipulated to strike "Guthneck's" and "measurement" from the last sentence in the caption amending the caption of photograph "H" to "Note flow is in excess of 25 gpm."

With the above amendments, the exhibit was entered into the record.

Applicants' Exhibit 5 consists of two pages. The first page discusses the oxygen requirements for the proposed pond. The second page discusses the number of fish one can keep in a pond with a given flow rate. (Although the caption on the second page of this exhibit uses the word "raise", it was repeatedly stressed during the hearing that Applicants have no intention of raising fish, they intend to stock fish in the pond for recreational

fishing.) This exhibit was entered into the record without objection.

Applicants' Exhibit 6 consists of two pages. The first page contains certain measurements and the resulting surface area of .57 acres. The second page has a rough drawing of Applicants' pond, measurements and calculations all done by Lee Yelin. This exhibit was entered into the record without objection.

Objectors' Exhibit 1 is a publication entitled Water Supply Outlook for the Western United States dated January 1, 1991.

Objectors' Exhibit 2 is a publication entitled Montana Water Supply Outlook dated April 1, 1989.

Objectors' Exhibit 3 is a publication entitled Water Supply Outlook for the Western United States dated March 1, 1991.

Applicants objected to these exhibits because they are forecasts for the Clark Fork River rather than records representing the actual water supply in the Plourde Creek drainage. Applicants also questioned the reason for providing only the three publications when there were certainly publications for the other months and years in question. The Applicant also pointed out there are other publications on the actual stream flows in the past years rather than these predictions. The Hearing Examiner reserved ruling on the objections until she reviewed the publications. Having thoroughly reviewed the exhibits, the Hearing Examiner finds that the publications are indeed forecasts. Although these publications show a 25 year average, there is no information on



specific precipitation amounts or flow rates during the period of time in question.

Objectors' Exhibits 1 and 3 are forecasts for the current year which predict there will be near or above average stream flow in the Clark Fork River in the St. Regis area in 1991. Objectors' intent when introducing these exhibits was to contradict testimony that the Plourde Creek area had been in the grip of a drought the last several years. Objectors' Exhibits 1 and 3 do not address the previous years therefore are irrelevant for that purpose. The Applicants' objection to these exhibits is sustained.

Objectors' Exhibit 2 on April 1, 1989 predicts the stream flow for the Clark Fork River at St. Regis in 1989 would be 97 percent of average. The Clark Fork River drainage down to St. Regis is a large area of over 10,000 square miles, while the Plourde Creek drainage is a very small area of approximately one half square mile. The prediction of this exhibit may indicate a trend in the area; however, one cannot assume the snow pack in the entire Clark Fork River drainage is the same as the snow pack in the Plourde Creek drainage. This exhibit contains no information of probative value. Applicants' objection to this exhibit is sustained and the testimony of Lee Yelin concerning these exhibits is stricken from the record.

The Department's files on the above-entitled Applications were made available to both parties for review. Objectors objected to the inclusion of a memorandum from Tony Olenichak,

Water Rights Technician, to Kathryn Lambert, Water Master, into the record as being irrelevant. Applicants agreed, therefore that document is not a part of the record. All other parts of the Department's files were accepted into the record.

#### PRELIMINARY MATTERS

Application No. 74297-s76M states the existing fish pond is three feet deep; however, when Applicants' counsel responded to the objections, he stated the pond would be excavated to eight feet in depth. Upon questioning, Applicants stated the entire pond area would not be excavated; only certain pockets would be excavated to a depth of eight feet. The proposed excavation while increasing the capacity of the fish pond reservoir from 0.1 acre-feet to .68 acre-feet using the Department's formula or 1.65 using the SCS formula, it would not alter the amount of water to be appropriated. Since the flow rate and volume of water remains the same as published, the modification of the Application is immaterial and need not be published again.

#### FINDINGS OF FACT

1. Section 85-2-302(1), MCA, states in relevant part, "Except as otherwise provided in (1) through (3) or 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Section 85-2-402(1), MCA, states in relevant part, "An appropriator may not make a change in an appropriation right

except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter, thus the Department has jurisdiction.

3. Robert E. and Shirley Anderson filed the above-entitled Applications with the Department on May 2, 1990.

4. Pertinent portions of the Application for Change of Appropriation Water Right No. G(W)012684-s76M were published in the Mineral Independent on November 21, 1990. Pertinent portions of Application for Beneficial Water Use Permit No. 74297-s76M were published in the Mineral Independent on November 29, 1990.

5. Application No. G(W)012684-s76M proposes to change the point of diversion for a water right claimed in Statement of Claim No. 012684-s76M to the SE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 10, Township 18 North, Range 28 West, Mineral County. The old point of diversion is a dam located on Plourde Creek in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10. The dam would not be removed in this process, rather a stainless steel collection box would be installed in Plourde Creek upstream of the dam to divert the flow into a pipeline which would carry the water to the place of use for irrigation. The control gate in the dam would be left open after the installation of the diversion works.

6. Application No. 74297-s76M proposes to appropriate 50 gallons per minute (gpm) up to 80.70 acre-feet of water per year from Plourde Creek for a flow through recreational fish pond and up to .05 acre-feet per year for stock water. The proposed point

of diversion would be in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West, in the same location and using the same structure described in Finding of Fact 5. The fish pond is located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10. The proposed place of use for the stock water is the E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10. The proposed period of use for both the fish pond and the stock water is from January 1 to December 31, inclusive of each year.

The proposed flow rate of 50 gpm will not produce 80.75 acre-feet of water per year; it will produce 80.65 acre-feet of water per year. Allowing .05 acre-feet of water per year for stock water leaves 80.60 acre-feet of water for the proposed fish pond.

7. Applicants hold Permit No. 6465-s76M to appropriate one acre-foot of water per year from Wolf Creek for a fish and wildlife pond as well as 40 acre-feet of water to be used for irrigation. Application No. 74297-s76M would be used to supplement that permit. Applicants have also filed a Statement of Claim for irrigation from Wolf Creek. That irrigation system prevents the use of Wolf Creek for the fish pond during the winter months due to the danger of freezing and damaging the risers. However, the Plourde Creek system is particularly suitable for the proposed use. The first riser in the Plourde Creek system is located next to the fish pond and the pipeline is equipped with a shut-off valve immediately below that riser. When the valve is closed and the riser is opened, the water flows into the fish pond. In the other seasons, Applicants would have

the latitude to use either or both sources for the fish pond.  
(Department records and testimony of Robert Anderson and Lee Yelin.)

8. The proposed point of diversion would be located immediately downstream from the Objectors' point of diversion.  
(Testimony of Applicant.)

9. Applicants own the place of use for both Applications.  
(Testimony of Applicants and Department file.)

10. Applicants have successfully used a stainless steel diversion structure nearly identical to the proposed means of diversion as a part of their other water uses on another creek.  
(Testimony of Lee Yelin and Applicants' Exhibit 4 "I".)

11. Applicants and Objectors measured the flow of Plourde Creek in September of 1990. There is no record of the exact date Applicants made their measurements. Applicants measured a flow of 20 gpm at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West. The Objectors measured the flow in the same location using the same device as the Applicants at the same location on four different occasions. On September 16, 1990, the average flow of the measurements taken was 23.6 gpm. The average flow of the measurements taken on September 18, 1990, was 25.6 gpm. On September 22, 1990, the average flow of the measurements taken was 23.4 gpm and the average flow of the measurements taken on September 25, 1990, was 26 gpm. (Department file and testimony of Robert Anderson and Michael Guthneck.)

12. Edwin Sansom had resided on the Applicants' property from the 1920's to the early 1940's and was very familiar with Plourde Creek and the surrounding area. Mr. Sansom testified that in his memory Plourde Creek had flowed approximately twice the flow he witnessed when he visited the site in November of 1990.

13. Robert Anderson, co-applicant, stated in his testimony and in an affidavit that he had personally observed the flow of Plourde Creek for many years and that generally the flow had been substantially greater than the 20 gpm he measured. (Testimony and Department file.)

14. Lee Yelin testified he had observed a flow rate of approximately 50 gpm in Plourde Creek in March of 1991. (Testimony and Applicants' Exhibit 4 "D" and "H".)

15. Proper management of a fish pond requires observation over a period of time to establish the best management techniques for that particular pond. (Testimony of Shirley Anderson and Lee Yelin.)

16. Water turnover in a fish pond is not necessarily the most important feature of a recreational fish pond. The most critical requirement for a fish pond is dissolved oxygen. Generally this requirement can be fulfilled by the amount of water flowing into the pond. If necessary, Applicants would install an aerator to supply the fish with the required dissolved oxygen. (Testimony of Applicants and Lee Yelin.)

17. The ideal stocking rate for Applicants' proposed pond would be 250 seven to eight inch fish with a 45.87 gallons per minute flow through. A fish pond such as Applicants are proposing could be sustained throughout the year with a flow through of 20 gpm if the number of fish stocked were reduced. The fish pond could also be sustained with less than a 20 gpm flow rate if the number of fish were reduced accordingly. (Testimony of Shirley Anderson and Lee Yelin and Applicants' Exhibit 5.)

18. Applicants operated the fish pond with the water from Wolf Creek for a few years; however, the pond did not seal properly and it was difficult to keep the pond viable. Then with the drought conditions the past few years, they lost the fish pond completely. Applicants applied clay and bentonite to the fish pond; however, the pond has not sealed. Applicants now plan to line the pond with a poly material to eliminate the seepage. (Testimony of Applicants.)

19. Applicants stated that if the Hearing Examiner found less than 50 gpm was available, they would accept a reduced flow rate.

20. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved that may be adversely affected by the Applicants' proposals. (Testimony of Lee Yelin.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### CONCLUSIONS OF LAW

1. The Department gave proper notice of these hearings, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
3. The Department must issue a Beneficial Water Use Permit if the Applicants prove by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and



other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The Department must issue an Authorization to Change Appropriation Water Right if the Applicants prove by substantial credible evidence that the following criteria, set forth in § 85-2-402(2), MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

5. Irrigation, stock water, and a recreational fish pond are beneficial uses. See § 85-2-102(2)(a).

6. The Applicants have a possessory interest in the property where the water is to be put to beneficial use for both Applications. See Finding of Fact 9.

7. The proposed means of diversion, construction, and operation of the diversion works for both Applications are adequate. See Findings of Fact 5, 6, 7, 10, 15, 16, 17, and 18.

8. The proposed use for Application No. 74297-s76M and the proposed change of point of diversion for Application No. G(W)012684-s76M will not adversely affect the water rights of other persons nor will they adversely affect or interfere

with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 8 and 19.

9. For Application No. 74297-s76M, the Applicants have provided substantial credible evidence that there are unappropriated waters in the source of supply at times when the water can be put to beneficial use proposed by the Applicants during the period in which the Applicants seek to appropriate. See Finding of Fact 11, 13, and 14.

It is not clear whether the full flow rate requested will be available throughout the period requested by the Applicants. It is known that at least 26 gpm was available in September of 1990 which was, according to the Applicant, a rather dry year. See Finding of Fact 11 and 18. Generally the autumn months of a year are periods of low flow; therefore, the spring and summer months would most likely have higher creek flows. An expert witness estimated a 50 gpm flow in March of 1991. See Finding of Fact 14. The water measurements on Plourde Creek in conjunction with testimony concerning flow rates, indicate the flow rate requested may not be available throughout the proposed period of appropriation. However, the Applicants can make beneficial use of whatever flow rate is available. See Findings of Fact 11, 12, 13, 14, 15, 17, and 19.

An Applicant is entitled to complete an appropriation of whatever waters, up to and including the amount requested, that are in fact unappropriated and which may be diverted without

injury to prior appropriators. A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature, until such time as the permittee actually applies the waters allowed by the permit to beneficial use. See §§ 85-2-313 and 85-2-315, MCA. See also In re Application No. 24921-s41E by Monforton; In re Application No. 49573-s41H by Carter.

10. The flow rate requested by the Applicant cannot produce the volume of water requested; therefore the Department cannot issue a Permit for the full amount requested. The Department may issue a permit for less than the amount requested. See § 85-2-312, MCA.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74297-s76M is hereby granted to Robert E. and Shirley Anderson to appropriate 50 gallons per minute up to 80.60 acre-feet of water per year from Plourde Creek for a flow through recreational fish pond and up to .05 acre-foot per year for stock water at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West, Mineral County by means of a collection box and pipeline. The place of use for the fish pond is the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10 and the place of use for the stock

water is the E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 10. The period of appropriation and period of use for both uses is from January 1 through December 31, inclusive of each year.

1. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana law.

2. This Permit is subject to the condition that the Permittee shall install an adequate device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand to the Department of Natural Resources and Conservation, Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806-5004.

Subject to the following terms, conditions, restriction, and limitations specified below, Application to Change Appropriation Water Right No. G(W)012684-s76M is hereby granted to Robert E. Anderson to change the point of diversion to the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 18 North, Range 28 West.

1. This Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the appropriator to divert water to the detriment of any senior appropriator.

2. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

3. This Authorization is subject to the condition that the Appropriator shall install an adequate device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand to the Department of Natural Resources and Conservation, Missoula Water Resources Regional Office, Holiday Village Professional Plaza, Suite 105, P.O. Box 5004, Missoula, MT 59806-5004.

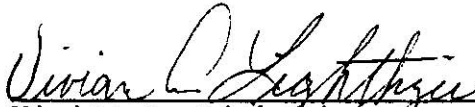
4. This Authorization is subject to the condition that the control gate in the dam shall remain open at all times after the installation of the new diversion works.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 3<sup>rd</sup> day of May, 1991.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 3<sup>rd</sup> day of May, 1991 as follows:


Robert and Shirley Anderson  
304 Mullan Gulch Road  
St. Regis, MT 59866

Michael and Barbara Guthneck  
338 Mullan Gulch Road  
St. Regis, MT 59866

Charles and Mary Jensen  
40 Frontage Road West  
St. Regis, MT 59866

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Michael P. McLane, Manager  
Missoula Water Resources  
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Cindy G. Campbell  
Legal Secretary